BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Promotion of Competitive Networks in Local Telecommunications Markets	)	WT Docket No. 99-217
	)	
Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services	)	
	)	
Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98

COMMENTS OF THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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SUMMARY

- Restrictions on telecommunications carrier access to multi-tenant environments are widespread and threaten the development of telecommunications competition.

- Multi-tenant environments comprise an important first stage for the development of local competition. Restrictions that impede competitive entry in multi-tenant environments will affect competitive efforts beyond those environments.

- The Communications Act provides sufficient authority for the Commission to eliminate restrictions on telecommunications carrier access to multi-tenant environments through exercise of authority over utilities and owners of multi-tenant environments.

- A requirement of nondiscriminatory telecommunications carrier access to multi-tenant environments does not amount to a taking of private property. The requirement is properly considered under the regulatory takings analysis of Penn Central rather than under the per se takings analysis of Loretto.

- The Commission should require universal location of the demarcation point in all multi-tenant environments at the minimum point of entry. Alternatively, the Commission should require that ILECs make available to telecommunications carriers as unbundled network elements the intra-building wiring from the building entrance facilities to the demarcation point and, separately, permit direct CLEC interface with the unbundled ILEC NID.

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The Association for Local Telecommunications Services ("ALTS") hereby submits its comments on the MTE access issues raised in the above-captioned proceeding.[1] ALTS is the leading

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[1] Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed To Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments;

national trade association representing facilities-based competitive local exchange carriers ("CLECs").

I. INTRODUCTION

Prior to 1996, many Americans were unable to take advantage of competitive telecommunications options because the incumbent local exchange carrier ("ILEC") prevented competitive carriers from offering their services to consumers. Today, the ILECs continue to construct obstacles to the competitive provision of telecommunications services. Nevertheless, even assuming full ILEC cooperation with the terms of the 1996 Act, another bottleneck threatens the development of competition for consumers living and working in multi-tenant environments ("MTEs"). Namely, the restrictions imposed by MTE owners and managers on competitive telecommunications carrier access to consumers in those MTEs are nullifying the progress made by the Commission and competitive carriers in bringing telecommunications competition to all Americans. If the well-being of consumers truly is the primary focus of the 1996 Telecommunications Act and the Commission's implementation thereof, the Commission must ensure that consumers have access to their telecommunications carriers of choice. As the examples below illustrate, many tenants are

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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, WT Docket No. 99-217 and CC Docket No. 96-98, *Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98*, FCC 99-141 (rel. July 7, 1999)("Notice"). ALTS expects to file comments on the issues concerning municipal rights-of-way in October.

being denied competitive options. It is the Commission's responsibility to eliminate these restrictions by providing for nondiscriminatory telecommunications carrier access to MTEs in order to serve the consumers located therein.

II. RESTRICTIONS ON ACCESS TO MULTI-TENANT ENVIRONMENTS PREVENT COMPETITIVE TELECOMMUNICATIONS CARRIERS FROM SERVING THE NATION'S SUBSTANTIAL INTRA-MTE RESIDENTIAL AND COMMERCIAL POPULATION.

Nearly one-third of this country's population lives in MTEs. More than 750,000 commercial office buildings exist in this country. In short, a substantial number of residential and commercial telecommunications consumers live or work in multi-tenant environments. These MTEs provide an ideal location to roll-out facilities-based competitive telecommunications networks due to the close proximity of many customers within one MTE and, in the case of urban centers, the concentration of MTEs within a small geographic area. Presumably, American consumers would like lower prices for telecommunications services and would like an increase in their choice of services and, likewise, competitive telecommunications carriers would like to serve those consumers. One would think that American MTEs would be booming centers of telecommunications competition with carriers competing vigorously on the basis of rates and offering increasingly innovative and dynamic services to consumers. But, competition is not progressing as rapidly as one would predict. Many MTE owners have placed restrictions on telecommunications carrier access to MTEs -- sometimes barring such carriers completely -- so that competition still does not exist in many MTEs.

The effects of an absence of competition within MTEs extend beyond those structures. In many instances, carriers will initiate their competitive service offerings in MTEs. If successful there, their footprint will extend to single tenant buildings, suburban areas, and rural markets. But the competitive carriers first must have success in their initial markets to expand. Consequently, the Commission is correct to recognize that "[i]f only a limited class of consumers can be accessed by competitive facilities-based providers, then it is unlikely that competition will grow to the point where it will effectively eliminate the incumbent LECs' market power."[2] The Commission is charged with primary responsibility for implementing the policies and terms of the 1996 Telecommunications Act.[3] Part of that responsibility involves an active role in eliminating MTE access restrictions for competitive telecommunications carriers.

The problem of MTE access restrictions has had over three years to work itself out through market-based solutions. CLECs and multi-tenant property owners can point to isolated examples wherein the marketplace has resulted in MTE access agreements that afford tenants the ability to take advantage of competitive telecommunications options. These isolated success stories bear similarities to the early growth of local competition. Prior to

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2 Notice at ¶ 24.

3 See AT&T Corp. v. Iowa Utils. Bd., 119 S.Ct. 721, 730, 733 (1999).

1996, there were also isolated instances of telecommunications carriers offering competitive local transmission services across the country. These isolated outgrowths could not be reasonably characterized as a victory for consumers nationwide. Moreover, sole reliance on the marketplace to open local exchange markets across the country would have resulted in decades of delay, at best. The Congress and the Commission recognized that interventionist policies were necessary to bring the benefits of competition to consumers. A similar approach is needed for opening MTEs to competitive telecommunications forces.

The real estate industry undoubtedly will assert that no action need be taken by the Commission -- that access is accomplished through marketplace negotiations. These real estate interests also will likely tell the Commission that they have the incentive to provide their tenants with access to the telecommunications services they desire. These sound like logical arguments, but the experiences of telecommunications carriers demonstrate that they are inaccurate and misleading.

As the examples below demonstrate, CLECs have been unable to gain access to many MTEs nationwide. The negotiations that real estate interests will claim are so successful simply haven't produced sufficiently broad access. Moreover, many MTE owners do not respect the wishes of their tenants. In many situations, tenants have requested services from CLECs and MTE owners, knowing this, still refuse CLEC access to the MTE. Finally, it is possible that many tenants have not made a big issue of the lack of competitive telecommunications options because the

benefits that accompany those options have been suppressed. MTE owners, through their access restrictions, preclude competitive telecommunications carriers from showing consumers that they can enjoy a wider array of telecommunications service from more responsive companies at lower rates than the incumbent offers them.

ALTS members have reported MTE access problems from around the country.

- In New York City, the property manager of an MTE has refused even to meet with a CLEC to discuss access despite a tenant's request for service from the CLEC. The property manager indicated that the CLEC simply will not be allowed in the building at all. The customer has told the CLEC that it is afraid the property manager will make life difficult for the customer if the CLEC aggressively pursues access. The property manager has given the names of other vendors in the building to the tenant, and told the customer to use one of them instead of the telecommunications carrier the customer had chosen. The tenant has written to the property manager to explain why it cannot use the existing vendors and that it wants service from the originally-requested CLEC. The CLEC still has no access, and cannot take further action with the property manager because of the customer's fear of property manager reprisals.

- In one Arizona building, a CLEC had pulled its fiber cable into the building, had access to the telephone closet and building risers, and had begun providing service to customers in the building with the landlord's permission. However, one of the CLEC's customers in that building recently requested expanded service from the CLEC, requiring an expansion of facilities. The building owner informed the CLEC that it could no longer have access to the telephone closet -- that it was the property of the incumbent LEC. Moreover, the building owner informed the CLEC that the building was now under exclusive contract to another carrier and that the CLEC would have to obtain permission from that carrier to service the equipment that the CLEC had already installed in the building. As a result, the customer in the building is experiencing delays in receiving expanded service while the CLEC negotiates with the building owner and the "exclusive" telecommunications carrier for access. Moreover, the CLEC's relationship with the customer is at risk and the CLEC's facilities that were

installed in the building several years ago are in jeopardy of becoming stranded assets.

- In California, a CLEC had a very large potential customer in an MTE owned by a person owning many commercial properties in California. In order to obtain access to the MTE, the MTE owner required that the CLEC share 15 percent of its revenues from customers in the MTE. No amount of negotiations would change the MTE owner's position. In fact, the CLEC even offered to rent space in the MTE like any other tenant (at the inflated tenant-space rates) in order to place its equipment there but the MTE owner refused to permit the CLEC to do so. The CLEC sought judicial application of eminent domain. The judge refused to recognize the California PUC's issuance of a Certificate of Convenience and Public Necessity to the company as sufficient evidence of necessity for entry into the MTE. The CLEC was required to pay the MTE owner's legal fees as well as its own. In the end, the process cost the CLEC $60,000 just for the MTE owner's fees. The CLEC had to inform the customer that it was sorry, but it was unable to provide service to the MTE.

- Many MTE owners in the Kansas City/St. Louis area have told the CLEC their belief that, if they wait to provide access, their MTE space will become more valuable and their leases will be written at a higher rate per square foot. Moreover, they are demanding larger and larger up-front fees.

- In one Houston MTE, the management company/owners have not denied CLEC access outright, but they have delayed it to the point that customers gained by the CLEC have been lost to the incumbent LEC. The delays include unnecessary engineering studies, excessive architectural plans, and demands from property management for additional fees not part of the original agreement.

- In Westchester County, New York, many MTE owners demand that the CLEC pay $2,000 or more monthly for rooftop space because cellular companies (which can spread these costs over a larger customer/geographic base) pay this amount.

- In another Houston MTE, a CLEC's margins have been seriously eroded due to the need to lease access from another telecommunications provider already in the MTE.

- One Chicago MTE owner demanded more than $2,000 per month for the CLEC to place a small antenna on the MTE rooftop to serve customers therein.

- In Louisville, Kentucky, after a CLEC had secured a customer, the CLEC was denied access by the building management company because of an exclusive contract with the local cable television company's telecommunications access provider.

Although the building management company assured the CLEC that the provider with whom it had an exclusive contract would cooperate with the CLEC, the only "cooperation" the CLEC received was an offer for the CLEC to take service from the other provider. The building management would not allow any other CLEC to bring fiber into the building. However, BellSouth was not subject to this prohibition. After over six months of negotiations with building management and the exclusive provider, the CLEC lost the customer.

- A CLEC reseller has secured exclusive access agreements in several Westchester County, New York MTEs, eliminating the ability of other CLECs to gain access to those MTEs.

- A representative from a nationwide property manager that manages over 25 MTEs in the D.C. area met with a CLEC representative several times regarding the CLEC leasing space to provide services to the tenants in the managed properties. The property manager advised that the MTE owners are not interested in competitive telecommunications carriers providing services to their tenants, and it is not a priority. The CLEC continues to negotiate with this property management company, although the large up front fees and access rates currently being demanded by the property management company would preclude the CLEC from serving customers.

- Lengthy delays have presented a serious problem in Texas. Some MTE owners and managers stay access negotiations until they can contract site management companies to represent them. Some of these delays have been going on for nearly two years.

- In the Bloomfield Hills, Michigan area, several MTE owners have simply refused to discuss access with the CLEC. They uniformly tell the CLEC that they have had a very difficult time with zoning issues and want nothing to do with a carrier that can create more problems for them in that regard. Thereafter, they simply refuse to discuss the matter further.

- In San Francisco, an MTE owner demanded such excessively high rents that the CLEC was unable to provide service to the tenants therein. A similar situation occurred at another San Francisco MTE property where an MTE owner has ignored the requests of the tenants for the CLEC services and insists on such high access fees that, for economic reasons, the CLEC is unable to provide service to the MTE.

- In a New York City MTE, there have been countless delays for nearly a year. The customer originally was going to let the CLEC collocate in the customer's space to serve them and other customers in the MTE. But, the tenant is having incredible difficulty getting the MTE owner to respond to the tenant's simple construction approvals and to a sublease request.

- Some Chicago MTE owners give the ILEC exclusive rights to the telephone equipment room, and require the CLEC to work through the ILEC for access to the consumers in the MTE -- a process that often proves unsuccessful and involves unreasonable delay.

- One CLEC sought a building access agreement with a large property holding and management company with properties nationwide. This company required an agreement fee of $2,500 per building in addition to space rental of approximately $800 to $1,500 per month per building. Moreover, the company refused to negotiate an agreement for fewer than 50 buildings. Finally, as a condition of entering into the agreement, the company insisted that the CLEC agree to refrain from making any regulatory filings concerning the MTE access issue.

- Some of the largest real estate investment companies in Texas -- with properties nationwide --routinely refuse to grant CLECs access to the tenants in their MTEs (despite a Texas law requiring them to do so) because they are holding out for higher rents.

- Another large property owner and management company demanded $10,000 per month per building just for access rights to building risers.

- Some Chicago MTE owners allow the CLEC access to their MTEs but they deny access to the house pairs, requiring the CLEC to construct costly individual home runs to every customer in the MTE.

- After 18 months of negotiations, a Colorado MTE owner charged a CLEC a $7,500 fee plus monthly lease payments for access to a single MTE.

- A telecommunications carrier has been negotiating with several Boston, Massachusetts, MTE owners for over a year and a half. The MTE owners stall negotiations, claiming that they are still examining the telecommunications issues. Meanwhile, their tenants remain without choice in telecommunications carriers.

- One Detroit, Michigan, MTE owner refuses to give the CLEC access (or any other CLEC) because it has equipment in the telephone closets designed to record telephone conversations and does not want CLECs to have access thereto. The MTE owner also explains that it does not want to set a precedent for allowing cabling from the roof to the inside of the MTE.

- In Houston, a CLEC already has access to an MTE, but the MTE changed ownership and demands more money from CLECs in exchange for access. The rates for space are already extremely high, and the CLEC is concerned that it will be

squeezed out of the MTE when the time comes to negotiate for renewal of the access agreement.

- In San Jose, California, after conducting engineering surveys and site surveys at the CLEC's expense, an MTE owner in San Jose agreed to grant the CLEC access to the building. The demarcation point was located in the basement telephone equipment room. The MTE owner left the keys to that room with a tenant. When the CLEC's engineers sought to access the equipment room with the key, they were unable to gain entry because Pacific Bell had come into the building, put its own locks on the door and left no key for the new locks. The CLEC contacted the MTE owner repeatedly by telephone and electronic mail and explained the dilemma, but has not received a response from the MTE owner.

- Several landlords in Florida do not understand the distinction between a fixed wireless carrier's technology and PCS. They seek to assess mobile rooftop rates for fixed wireless carriers' smaller antennas. These fixed wireless antennas are building-specific in that they are used only to serve the customers within that structure. By contrast, a mobile carrier's (i.e., cellular and PCS) antenna serves a much wider geographic area. Consequently, the mobile antenna's siting costs can be spread over a larger customer base than can a fixed wireless carrier's antenna siting costs.

- A very large property investment company in New York City specializes in the type of MTEs that typically contain the customers that the CLEC targets (small and medium-sized businesses). The company has an exclusive arrangement with a small reseller. In exchange for access and exclusivity, the reseller gives the property investment company 7-12 percent of its telecommunications revenues. Consequently, the property investment company simply refuses to do business with any other telecommunications carrier. Another large real estate investment company in the New York City area maintains a similar agreement with the same reseller and also refuses to permit other CLECs to access the multi-tenant properties it owns.

- In Boston, Massachusetts, a telecommunications carrier's site acquisition managers receive frequent "not interested" or "no" responses from MTE owners and property managers to the telecommunications carrier's requests for negotiating access to MTEs.

- In Washington State, the owner of a new building put the provision of telecommunications services to the tenants out to bid. The winning bidder would gain exclusive access to provide telecommunications service to the tenants in the building. The incumbent provider was able to outbid all other providers, offering to pay $10,000 every year to the building

owner. The incumbent was thereby able to shut its competitors out of the building entirely.

- For over a year, a telecommunications carrier in the D.C./Baltimore area has sought to negotiate with a property management firm that has refused even to negotiate with the telecommunications carrier, claiming that its tenants are happy and do not wish to take service from the telecommunications carrier.

- The landlord of a 125,000 square foot MTE in Detroit, Michigan will not accept anything less than $1,800 per month for rooftop access. The landlord claims that access will be a bother for him and he needs at least $1,800 per month to make it worth his time.

- The owner of a Jacksonville, Florida MTE refused to allow a CLEC access to the MTE's riser cables. The owner indicated that it was continuing to monitor legislative developments in Florida to determine whether it could continue to deny access.

- A small company owns approximately five buildings in the D.C. area. The CLEC met with company representatives on several occasions. The negotiations broke down because the representative unconditionally demands that the CLEC permit the company to partner with it in providing telecommunications services to the tenants, and demands revenue sharing, as well. After the CLEC refused this arrangement, the company representative will not speak with the CLEC.

- At a San Francisco MTE, tenants have repeatedly requested services from a competitive telecommunications carrier, but the property manager has ignored those tenant requests and simply refuses to deal with the telecommunication carrier.

- In Austin, Texas, from June 1998 to May 1999, the property manager of an MTE delayed CLEC entry due to claims of no space. After almost a year of CLECs working on the property to resolve the situation, the property manager finally responded with plans to create space for multiple telecommunications carriers in individual cages -- similar to collocation. Highly unreasonable fees are being demanded, including a requirement that the first CLEC in the space pay the full construction costs of all space, with reimbursement from others when the space is leased. (This is similar to the ILEC physical collocation requirements that the Commission recently disallowed.) Meanwhile, the CLEC reporting this arrangement has lost customers in the MTE.

- The management company of a large Miami, Florida, building requires additional fees to be paid when customers on different floors are connected to the telecommunications carrier. Moreover, the landlord seeks $1,000 per month as a

rooftop fee (for a 10'-by-10' space) plus an additional $100 a month for each new customer hook up.

- In exchange for access to the consumers in one Chicago MTE, the MTE owner demanded that the telecommunications carrier provide it three free DSL lines and open-ended rent before the owner would sign an access agreement. The telecommunications carrier had to decline.

- For over a year, a telecommunications carrier has negotiated with a large property management company for access to the managed MTEs in the D.C. area. The property manager hired a rooftop management firm six months ago. The rooftop management firm demanded that the telecommunications carrier share telecommunications revenues derived from each of the MTEs in addition to paying exorbitant access fees. When the negotiations broke down, the rooftop management company advised the property management company not to move forward with the telecommunication carrier under any circumstances and, consequently, discussions with the property management firm have been foreclosed.

- An MTE in New York City has been through three different owners since October 1998, and a CLEC still cannot gain access. Tenants in the MTE have sent letters to the new owners requesting access for the CLEC. The MTE owners have responded to the tenants that they are working with the CLEC when, in fact, they are not doing so. The CLEC is about to lose these customers because they are tired of waiting and are being harassed by the property owners.

- A telecommunications carrier's site acquisition representatives in Kansas City and St. Louis have encountered large property management companies that have permitted one CLEC into their MTEs but refuse to permit additional carriers -- and not because of space concerns. Rather, they feel there is no need for their tenants to have more than two choices in telecommunications carriers.

- At a San Francisco property, managed by a nationwide property management firm, a telecommunication carrier conducted site surveys and is ready to install facilities, but the management company will not return the telecommunication carrier's telephone calls to discuss the matter of access.

- A CLEC in Houston has experienced unnecessary delays in seeking access to an MTE in which it has already secured a customer. The MTE owner refuses to return the CLEC's telephone calls and refuses to show the CLEC's engineers around the MTE to do a site survey for the customer. The CLEC is trying to resolve the situation by using the customer to negotiate with building management. But building management is unresponsive to the tenant's needs. The CLEC is concerned

that the customer may eventually conclude that it is easier just to stay with the incumbent.

- In St. Louis, MTE owners and managers are too busy to address the issue of telecommunications carrier access and simply refuse to discuss or negotiate the matter with the CLEC. Their time constraints make it very difficult for the CLEC to educate the MTE owners on the importance of competitive telecommunications carrier access.

- A landlord of an MTE in Orlando, Florida refused access to the CLEC entirely. Moreover, he told the CLEC that he did not want the CLEC soliciting his tenants and thought that the incumbent local exchange carrier was sufficient for the MTE.

- In Birmingham, Alabama a CLEC had negotiated a $500 per month fee for access (a very high rate, as it is) in an MTE in which it had secured a customer. At the last minute, the MTE management company increased the fee to $5,000 per month.

- In a San Francisco MTE, consumers in the MTE have requested the telecommunications carrier's services but the MTE owner simply refuses to grant the telecommunications carrier access.

- In another Birmingham MTE, a CLEC has been waiting for nearly a year to obtain from the MTE owner the contractual documents that must be executed before the CLEC will be permitted to access the MTE.

- The owner of an MTE in Orlando, Florida refused access to the CLEC, claiming not to have sufficient room for another provider and stating that he was not interested in any event.

- A CLEC is unable to obtain access to a group of Houston, Texas, MTEs managed by the same property manager because the property manager does not want to "bother the owners with this sort of thing."

- In New York City, a telecommunications carrier has been unable to secure access to many MTEs because the rates for access demanded by the MTE owners are too high, or because the MTE owners insist upon revenue sharing arrangements.

- In an Arizona property, the incumbent and one competitive provider had installed facilities. Four additional CLECs requested access. The property owner demanded that the four new CLECs provide conduit, fiber connectivity between buildings, and dark fiber to the property owner free of charge -- approximately $200,000 of in-kind contributed facilities. The property owner also seeks to charge a $750 per month access fee for access to the property even though the access will not deprive the property owner of leasable space to tenants. This situation places the four new CLECs at a

competitive disadvantage to the two providers already inside the MTE.

- A D.C. property management company chose one CLEC to be the only telecommunications provider to the managed properties and refuses to speak with other CLECs about access arrangements.

- Many owners and managers of buildings in Florida have demanded revenue sharing arrangements with CLECs in exchange for access to the building.

- In Cleveland, Ohio, CLECs have reported to ALTS demands for outrageous building entry fees (i.e., over $1,500 per month) just for access -- CLECs are also required, then, to pay the cost of separate metering for electricity as well as for their monthly electric consumption. In addition, some Cleveland MTE owners are charging non-recurring "administrative fees" from $1,500 to $3,500.

- A large number of MTE owners and managers in Florida do not see the need for another telecommunications provider in the building.

- Some Cleveland MTE owners have inserted provisions in access agreements that allow the MTE owner to install a cable distribution system in the future that would require the CLEC to remove its own riser cables and connect to the cable distribution system at an additional fee per cable pair used. In most instances, the requirements to pay access fees and to sign a contractual agreement are not applied to the incumbent LEC.

- In Houston, Texas, several MTE owners have demanded that CLECs pay fees for space based on riser space per linear foot of vertical building instead of actual space used. The MTE owners refuse to negotiate this position, and claim that CLECs are not being denied access although the steep rates keep the CLECs from doing business in the MTEs. In reference to questions as to whether the ILEC is paying the rate demanded of CLECs, the MTE owners typically respond, "No, because they were in the building first."

- The management company of a large MTE outside Orlando, Florida, refused to allow a fixed wireless CLEC access claiming it didn't want the carrier's antenna on the roof for aesthetic reasons.

- In exchange for access, some MTE owners in Chicago are requiring telecommunications carriers to fund their new MTE riser systems. Others require participation in the Central Distribution System. That is, the MTE owners establish a riser system and then require CLECs to construct cabling through those risers at the CLEC's expense and then to turn

ownership for the cabling over to the MTE owners. The MTE owners then permit other CLECs to use the installed cabling for a fee. The MTE owners even charge the installing CLEC per line usage fees for the cabling.

- In New York City and Jersey City, MTE owners have flatly refused CLEC access saying they already have telecommunications providers in their buildings and do not need any more.

- The manager of one large Florida property has demanded from a fixed wireless CLEC a rooftop access fee of $1,000 per month and a $100 per month fee for each hook up in the building. The CLEC estimates that this fee structure would cost it about $300,000 per year -- just to service one building.

- In Concord, California, an MTE owner refuses to grant the CLEC access to the MTE because BOMA has told the owner that it is not clear that the owner must grant the CLEC access.

- In an Austin MTE, the owners had not made any effort to follow Texas PUC rules concerning MTE access. In November 1998, the CLEC met with the property manager to discuss changes to the proposed agreement. The property manager had changed and indicated that there was nothing in the files pertaining to the CLEC's access agreement. Five months later, the CLEC was able to meet with the owner of the Austin MTE (who is located in New York City) and the owner agreed to work on resolving the access issues. Since that time, the CLEC has had no response to repeated telephone calls and correspondence. The CLEC also continues to try to work with the property manager at the MTE who continues to assure the CLEC that requests are being forwarded to the main office -- although there are no results from this process, either. The CLEC continues to lose customers in the MTE to the ILEC.

- In an Orlando, Florida MTE, the owner refused access to a fixed wireless telecommunications carrier. He did not want an antenna on the MTE. When the telecommunications carrier sought to allay his concerns with an explanation of its technology, the MTE owner did not want to take any time to understand how the telecommunications carrier's equipment worked or its small size (the telecommunications carrier's antenna is approximately 12 inches in diameter -- smaller than a PC monitor). He claimed that he was satisfied with the incumbent local exchange carrier and did not want a second telephone company in the MTE.

- One large MTE owner in Houston, Texas will not permit antennas on the MTE rooftops and will not provide space within the MTEs for telephone equipment. The owner's engineer told one telecommunications carrier that the owner would find any

obstacle necessary to keep CLECs -- fiber-based and wireless alike -- out of the MTEs.

- One Boston, Massachusetts MTE owner demanded $5,000 per month for the fixed wireless CLEC to place its 12 inch antenna on the MTE rooftop to serve customers therein.

- The management company for a Florida MTE demands that a telecommunications carrier pay the management company $700 per customer for access to the MTE, in addition to a sizable deposit, a separate monthly rooftop fee, and a substantial monthly fee for access to the MTE's risers. Taken together, these fees preclude the company from providing tenants in that MTE a choice of telecommunications carriers.

- Several MTE owners in Chicago, after being told that tenants within their buildings have requested the CLEC's services, have refused access and told the CLEC that they do not care if their tenants have a choice of telecommunications providers.

- One CLEC's site acquisition representatives sought on several occasions to discuss leasing space with a company owning many MTEs in the D.C./Baltimore area. A Vice President from the company repeatedly refused to meet with the CLEC and threatened to report the CLEC for harassment if the CLEC representatives called him again. Consequently, the CLEC has not contacted this company since. It has been six months since the last attempt at discussions.

- In Houston, one CLEC was delayed for over 8 months because the MTE owner (with properties nationwide) claimed that it was considering hiring a consultant for advice on leasing telecommunications space within the building. Upon obtaining a consultant and after meetings and review of the agreement, the MTE owner claims it cannot execute any agreement until its consultant has completed a national agreement with another CLEC. The CLEC remains without access to the MTE.

- A landlord in Orlando, Florida requires a $2,500 up-front deposit to serve the MTE plus $700 per customer plus $600 per month for access to riser cables and, for fixed wireless carriers, $475 per month for rooftop access. The recurring costs of up to $1,075 per month render service to the MTE economically infeasible. The landlord indicated that it had all the necessary telecommunications services it needed without the telecommunications carrier.

- A large number of MTE owners and managers do not want a second telecommunications carrier in the building because of revenue sharing arrangements with the first carrier and many have entered into exclusive access contracts with a single carrier; indeed, one management company told a CLEC not to solicit its tenants.

- Many Detroit, Michigan MTE owners have simply refused to discuss MTE access matters with a fixed wireless carrier because, as one MTE owner put it, they have "gone without antennae up there for this long, so [they] don't need to start putting them up there now."

- In a New York City MTE, the MTE manager will not permit CLECs into the MTE without paying a percentage of revenues. A CLEC has appealed to the MTE owners, but has had no response to telephone calls or requests for meetings. Indeed, this is not uncommon. ALTS understands that countless management companies across the country demand revenue sharing arrangements in exchange for telecommunications carrier access to MTEs.

- A realty group with control over a substantial number of MTEs in New York City has formed a telecommunications arm which demands that CLECs share an enormous percentage of their revenues in exchange for access. It will not negotiate alternative arrangements.

- In one small Detroit, Michigan MTE, two tenants have requested a fixed wireless CLEC's service, have signed long distance contracts, and are waiting for the CLEC to serve them. The landlord refuses even to negotiate with the CLEC for access unless the CLEC agrees to pay, at minimum, $1,000 per month to place its antenna on the rooftop -- and the MTE is only 84,000 square feet. The landlord claims that an amount less than $1,000 per month is not worth his time. The amount demanded would make it impossible for the CLEC to serve the consumers profitably. The customers still do not have access to the carrier of their choice.

- In Colorado, CLECs have received MTE access quotes as high as $4,500 per month, with annual escalation clauses, for the right to overbuild (as opposed to using existing facilities) within the MTE.

- Some owners of newly constructed MTEs are installing "central distribution systems" ("CDS") in their MTEs -- an intra-building telecommunications network. Rather than allowing carriers to install their own facilities all the way to the customer, the MTE owner requires the carriers to utilize the CDS. However, some of these facilities are not advanced enough to carry adequately the traffic of more advanced carriers. Moreover, the MTE owners will not guarantee the reliability of these CDS intra-building networks. In addition, MTE owners often seek to charge excessive rates for use of a CDS that many carriers would rather not use. Finally, some MTE owners are requiring telecommunications carriers to sign agreements that once a CDS system is installed, it must be used by the carrier -- forcing CLECs to promise to strand their installed investments within

buildings. This creates a tremendous disincentive to serving customers in these MTEs.

The CLECs reporting these problems have done so anonymously for fear of reprisals from property owners and managers. This fear is not without basis. When MTE access legislation was being considered in Florida, BOMA's attorney sent the site acquisition manager of one prominent CLEC an electronic mail message strongly suggesting that the CLEC draft a letter to Florida legislators asking them to oppose the pending nondiscriminatory access legislation. The BOMA e-mail went on to state that

> those CLECs who take a stand against mandatory access legislation will ultimately benefit from that position. In other words, if a landlord has a choice of doing business with one of two CLECs, where CLEC 1 advocates mandatory access and CLEC 2 opposes it publicly, the landlord will favor doing business with CLEC 2 because of its concern for the landlord's private property rights. Consequently, opposing mandatory access should improve a CLEC's competitive position vis-a-vis ILECs as well as most other CLECs.

Given the vehemence with which BOMA and like interests address this matter, it is not surprising that the issue is one that state legislatures would prefer to avoid. BOMA's political activities have made this issue extremely difficult to resolve at the state level. For example, in response to draft nondiscriminatory MTE access legislation in Louisiana, BOMA told the legislators that the FCC was addressing the issue so there was no need for them to do anything. Predictably, the Louisiana legislation died.

In Florida, parochial interests succeeded in defeating a nondiscriminatory MTE access bill there. The Florida Public

Service Commission instituted a nine-month intensive investigation into the MTE access issue and presented the Florida legislature with its findings, recommendations, and even suggested language for a bill. Notwithstanding ultimate support from the real estate industry and the telecommunications industry on a compromise MTE access bill, the bill was never permitted to come to the Florida Senate floor for a vote. The Florida Senate Rules Committee Chairman, a developer of shopping centers and office parks, blocked a vote on the bill. Indeed, a St. Petersburg Times article written shortly thereafter criticized the Rules Committee Chairman for a conflict of interest.[4]

Although CLECs continue to try to win legislation on a state-by-state basis, the process is not only slow and extremely expensive, but also thus far largely unsuccessful. State PUCs typically believe they lack the requisite jurisdiction to address the matter. The issue continues to be handed off from one forum to another without action. ALTS strongly discourages the Commission from doing the same. Given its responsibility for implementing local competition nationwide, the Commission must definitively eliminate the bottleneck between telecommunications carriers and their consumers in multi-tenant buildings.

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[4] See Martin Dyckman, "Conflict of Interest? No Problem," St. Petersburg Times (Apr. 28, 1999).

III. THE COMMISSION HAS AMPLE AUTHORITY TO MANDATE NONDISCRIMINATORY TELECOMMUNICATIONS CARRIER ACCESS TO CONSUMERS IN MTEs.

The harm to telecommunications competition caused by MTE access restrictions is manifest and the problem is widespread. The Communications Act offers several bases of authority for the Commission to resolve the issue for the good of all consumers. Indeed, during a hearing on the access issue, members of Congress made clear their belief that the Commission already has sufficient authority to address the MTE access issue. Representative Pickering told Mr. Sugrue that

> [i]n the structure of the bill, the Telecommunications Act, we tried to provide you with the flexibility to achieve the objectives of the Act. And we gave you pretty broad authority . . . I do think we gave you the broad authority and the flexibility to address these issues.[5]

Chairman Bliley noted that "some building owners and managers are mistakenly restricting access . . . . the FCC ought to be using its power to help us find some solutions."[6] Representative Markey was specific in outlining the various bases of Commission authority to act.

> The Telecommunications Act did not contain a specific provision relating to building access for telecommunications services, yet Congress did include section 207 which required the FCC to preempt restrictions on the placement of over-the-air devices to

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5 See, e.g., Access to Buildings and Facilities by Telecommunications Providers Hearing Before the Subc. on Telecommunications, Trade, and Consumer Protection of the Committee on Commerce, House of Rep., Serial No. 106-22, 106th Cong., 1st Sess. 85 (May 13, 1999).

6 Id. at 5.

> receive video programming. Moreover, the Commission has some underlying authority, such as pole attachment provisions and inside wiring regulations, that can affect building access for competitors.[7]

ALTS attaches to these comments and incorporates by reference a White Paper entitled, "Bringing Telecommunications Competition to Tenants in Multi-Tenant Environments" that was submitted to several persons at the Commission on behalf of ALTS, NEXTLINK, PCIA, Teligent, and WinStar before this docket was created. It provides an in-depth analysis of the several bases of the Commission's subject matter and in personam jurisdiction to require nondiscriminatory MTE access. ALTS will not repeat that analysis here. Suffice it to say that the Commission's authority to tackle the issue is broad and may be derived from any of a number of statutory provisions.

The takings issue, too, is a red herring insofar as the Commission's regulations simply mandate nondiscrimination. The Supreme Court has "expressly rejected the notion, urged by the landowners, that they possessed a per se Takings Clause right 'to choose their incoming tenants.'"[8] In other words, Loretto's very limited per se analysis does not apply where nondiscrimination is the central focus of a regulation. To be sure, takings may be implicated by the action. But the proper analysis is not a per se analysis. Rather, the proper analysis is the three-part

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[7] Id. at 3.

[8] Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 708 (9th Cir. 1999)(citing to Yee v. City of Escondido, 503 U.S. 519, 530-531 (1992)).

regulatory takings analysis developed by the Supreme Court in Penn Central.[9] Even a rudimentary application of that test demonstrates sufficiently that nondiscriminatory MTE access requirements do not involve a taking of private property.

IV. IN ADDITION TO DIRECT REQUIREMENTS ON MTE OWNERS, THE COMMISSION CAN TAKE OTHER ACTIONS TO PROMOTE ACCESS TO TELECOMMUNICATIONS OPTIONS FOR CONSUMERS IN MTEs.

MTE owners and managers are not the only obstacle to the provision of competitive telecommunications services within MTEs. Even where an MTE owner is willing to grant access to competitive telecommunications carriers, ILECs are able to delay CLEC entry or increase the costs thereof. This is because portions of the ILEC network often extend within MTEs. The Commission can take several steps to ameliorate this problem.

The most effective method of eliminating the ILEC's ability to restrict competitive entry is to require that the demarcation point in all multi-tenant buildings be located at the minimum point of entry ("MPOE") and to permit CLEC interface with the intra-building network at that point. This will ensure that all carriers -- incumbents and new entrants alike -- will interface with the building network at the same point. The uniform interface point at the MPOE will reduce the cost advantages of incumbency by making the costs of reaching a customer in the building more similar among carriers and will restrict the

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9 Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123-125 (1978).

ability of ILECs to exert control in such a manner as to prevent competitive entry.

Barring location of the demarcation point at the MPOE, the Commission can require ILECs to make available as a network element that portion of the ILEC network from the MTE entrance facilities to the demarcation point and, separately, direct interface with the NID, on an unbundled basis pursuant to Section 251(c)(3). For carriers that bring facilities up to the MTE, this will avoid the need to purchase an entire loop in order to reach the end user. ALTS proposed the identification of intra-building wiring as a UNE in response to the Commission's UNE Remand NPRM.[10]

Finally, the Commission should adopt its tentative conclusion that Section 224's requirement that utilities provide nondiscriminatory telecommunications carrier access to the conduit and rights-of-way owned or controlled by utility includes conduit and rights-of-way that exist within MTEs.[11] In so doing, CLECs will be able to traverse the ILEC distribution network within MTEs (that, often, were accomplished as a benefit of incumbency) in order to serve customers therein.

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10 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket Nos. 96-98 and 95-185, *Comments of the Association for Local Telecommunications Services* at 70-72 (filed May 26, 1999).

11 Notice at ¶¶ 40-45.

The Commission should not place complete reliance on Section 224 as a vehicle for ensuring nondiscriminatory access to MTEs. Section 224's reverse preemption provision renders the Commission without authority to enforce that section in 19 States.[12] Some of these States, such as California, New York, Illinois, and Ohio, represent a sizable portion of the U.S. population. The Commission should both require State re-certification pursuant to Sections 224(c)(2) and 224(c)(3) -- a requirement that is long overdue given the substantial revisions made to Section 224 by the 1996 Telecommunications Act -- and, as part of that re-certification process, should confirm that States implementing Section 224 also require telecommunications carrier access to MTEs consistent with the Commission's interpretation of that provision.

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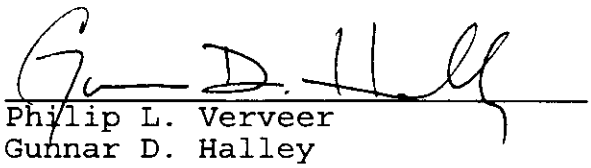
12 See "States That Have Certified That They Regulate Pole Attachments," DA 92-201, *Public Notice*, 7 FCC Rcd 1498 (Feb. 21, 1992).

V. CONCLUSION

For the foregoing reasons, ALTS respectfully urges the Commission to adopt rules that require MTE owners to provide nondiscriminatory telecommunications carrier access to consumers in MTEs and that restrict the ability of ILECs to delay or raise the cost of competitive entry into MTEs, consistent with these comments.

Respectfully submitted,

ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES

By: 
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